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72-177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-177

HOWARD STATON MILLER,

Petitioner,

—v.—

J. D. Cox, Superintendent of the Virginia State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HOWARD STATON MILLER,

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—v.—

J. D. Cox, Superintendent of the Virginia State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Howard Staton Miller, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on March 30, 1972.

Opinions Below

The opinion of the United States Court of Appeals is reported at 457 F.2d 700 and is set forth in the Appendix, *infra,* at pp. 1a-7a. The opinion of the United States District Court for the Eastern District of Virginia is unreported and is set forth in the Appendix, *infra,* at pp. 9a-15a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 30, 1972. A timely petition for rehearing en banc was denied on May 1, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Question Presented

Whether the appearance of conflicting interests among indigent co-defendants being jointly tried imposes a constitutional duty on the trial court to appoint separate counsel for each?

Constitutional and Statutory Provisions Involved

Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

Virginia Code Ann., Title 19.1:

> § 202. Separate juries for separate trials of persons jointly indicted.
>
> If a person, indicted jointly with others for a felony, elects to be tried separately, the venire summoned for their trial may be used for him who is first tried and the court shall award a venire facias for the trial of the others, jointly or separately, as they may elect.

Statement of the Case

The petitioner, Howard Staton Miller, is presently confined at the Virginia State Penitentiary, serving sentences totaling twenty (20) years. The sentences were imposed following petitioner's conviction, along with two co-defendants, in the Hustings Court of the City of Richmond, Virginia on single counts of armed robbery, abduction and unauthorized use of an automobile.

One court-appointed attorney represented Miller and his two co-defendants, the brothers Lavone and Grover Robbs, throughout all proceedings against them. He was assigned as counsel a week after their arrest. He represented Miller and Grover Robbs before the juvenile court which waived them for trial as adults (Tr. 3-6), and he represented all three defendants at trial, at sentencing (Tr. 65-74), and on appeal.*

The trial was held without a jury after an express waiver by each of the defendants (Tr. 8-9). Before the trial got underway, the judge asked the appointed attorney whether there was a conflict of interest, and he assured the judge there was none (Tr. 9-10). The judge asked the defendants whether they agreed to trial together on joint charges, were satisfied with their lawyer, and were ready for trial; they made the appropriate responses (Tr. 6-9). Three other times during trial and sentencing, upon inquiries from the judge, the defendants repeated that they were satisfied with their lawyer (Tr. 19, 59, 66).[1]

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* "Tr. ——" refers to the transcript of the petitioner's trial.

[1] These colloquies are set forth in the Appendix, *infra*, at pp. 16a-22a.

Only the prosecution introduced evidence at trial. The evidence showed that early in the morning of April 7, 1968, three black men held up a gas station at gunpoint and abducted the attendant in his own car (Tr. 21-27). Because of a timely police alert, the attendant was rescued but the thieves escaped (Tr. 39-40). A few hours later, the petitioner and Lavone Robbs were arrested because they ran from a police car (Tr. 51-52). For reasons not clear in the record, the police identified them as suspects in the gas station robbery and took them to headquarters for questioning (Tr. 52-53).

At headquarters, they were placed in a room with Grover Robbs, who had been taken into custody by other officers under circumstances not disclosed (Tr. 43). The three of them were given warnings of their rights (Tr. 41, 44-45). The petitioner and Lavone Robbs denied involvement in the robbery and declined to make any further statement (Tr. 45). But under questioning, Grover Robbs accused Miller and Lavone Robbs of the robbery and admitted his own guilt (Tr. 45). Miller and Lavone Robbs heard the accusation and remained silent, although they later repeated their claims of innocence (Tr. 43, 45-46).

The gas station attendant testified that seventy dollars and some rolls of coins were taken from the station (Tr. 23). He said he could positively identify Lavone Robbs because he had held the gun during the robbery (Tr. 22-23, 25, 27, 30) and Grover Robbs because he had held the gun during the abduction (Tr. 25, 28, 30). He also remembered the color of the coats Lavone Robbs and Grover Robbs had been wearing (Tr. 30-31). Although he positively identified Miller as the third member of the group that robbed him, in contrast to his identification of the other two, he could

point to no physical characteristic or feature of dress to substantiate the identification (Tr. 27-31, 38).

Through the testimony of the officer who conducted the interrogations, the prosecution introduced the substance of Grover Robbs' statement and Miller's and Lavone Robbs' silence in the face of it (Tr. 41-43, 45-46). No objection was made on behalf of any defendant. The only other police evidence of importance was a description of the results of a search of the suspects (Tr. 42-43, 54, 57). Lavone Robbs was found in possession of a pistol (Tr. 56-57). The pistol was never introduced into evidence or identified in any way by the attendant. Miller was found with twenty-eight dollars in cash, three rolls of pennies, a roll of nickels, and some loose change (Tr. 42, 54). Nothing was found on Grover Robbs (Tr. 43).

The appointed defense counsel did not call any of the defendants to the stand to testify in their own behalf or as witnesses for the others (Tr. 58-59). He waived opening and closing argument (Tr. 58, 61). The trial judge immediately reached verdicts of guilty against each defendant for armed robbery, abduction and unauthorized use of a motor vehicle. His stated findings in support of the verdicts were that the attendant had ample opportunity to observe the thieves and had made a positive identification, that a pistol was found in Lavone Robbs' possession, and that Miller and Lavone Robbs had failed to deny Grover Robbs' accusations made during police interrogation (Tr. 61-62).

The appointed defense counsel made no motions for post-trial relief. He appeared with Miller and his co-defendants at sentencing several weeks later, but he introduced no evidence and made no argument on behalf of any of his

clients (Tr. 65-71). Lavone Robbs' presentence report indicated that he had been in serious trouble as a juvenile, that he had constantly violated probation, that he had a record of breaking and entering as well as larceny and that he had just completed a prison sentence for grand larceny. He was sentenced to twenty years (Tr. 67-68). Grover Robbs, who apparently had a lengthy juvenile record, and Miller, whose only previous offense had been tampering with an automobile, were also sentenced to twenty years (Tr. 68-70).

The attorney noted an appeal on the petitioner's behalf, but the only substantive ground raised (in addition to boilerplate contentions) was that the sentence constituted cruel and unusual punishment. In December 1968 the Virginia Supreme Court of Appeals declined to issue a writ of error.

Thereafter in March 1969, the petitioner filed a habeas corpus application with the trial court. The application was denied without an evidentiary hearing and without opinion. A writ of error to appeal this order was denied by the Supreme Court of Appeals.

In April 1970, the petitioner, acting *pro se*, filed the instant habeas corpus proceeding in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. Section 2241 *et seq.*[2] He raised a number of challenges to the conviction, but District Judge MacKenzie dismissed the petition (App., *infra*, at pp. 9a-15a). In dealing with petitioner's conflict of interest claim, the court relied exclusively on petitioner's record acquiescence

[2] It is conceded that state court remedies had been properly exhausted (App., *infra*, at p. 10a).

in the arrangement and on the trial attorney's statement that he perceived no conflict (App., *infra*, at pp. 12a-13a).

On appeal, the Fourth Circuit affirmed the denial of habeas corpus relief. That court held that the petitioner had failed to demonstrate that his interests were "significantly in conflict" with those of his co-defendants (App., *infra*, pp. 3a-4a).

It is to review this judgment that petitioner seeks certiorari.

REASONS FOR GRANTING THE WRIT

Thirty years ago, in *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court held that the Sixth Amendment forbids ordering a lawyer to represent conflicting interests simultaneously. Ever since, the Courts of Appeals have regularly disagreed over what constitutes such a forbidden order. The grounds of dispute are now so varied and the conflicts among circuits so extensive that only this Court can satisfactorily settle the constitutional problems involved in appointing one lawyer to represent two or more indigent defendants.

The need for resolution of these problems is especially urgent because not only has the right of indigents to counsel been dramatically expanded in the thirty years since *Glasser* was decided, *Argersinger* v. *Hamlin*, 40 U.S.L.W. 4679 (U.S. June 12, 1972); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), but the number of criminal offenses and arrests also has exploded. *President's Commission on Law Enforcement and Justice, The Challenge of Crime in a Free Society*, 22-27 (1967). With better than half of those

prosecuted being indigents, and joint appointments of counsel for multiple defendants routine, a decision on the issues raised by this petition will have far-reaching impact. *President's Commission on Law Enforcement and Justice, Task Force Report on the Administration of Justice* 154 (1967).

The sole justification for the unbridled appointment of joint counsel—the reduction of expenses—is baseless. The financial savings on joint appointments are dissipated by late continuances, late severances and mistrials from conflicts of interest not sooner discovered. Furthermore, the practice of routine joint appointments creates an inherent conflict of interests at the very outset since the appointed attorney normally receives additional financial compensation for representing multiple defendants on related charges in one proceeding.

The issue raised by this petition goes to the heart of the Constitution's guarantee of a fair trial to every person, rich or poor. What is at stake here is not simply a matter of economics or efficiency, but the right to effective representation by someone entirely devoted to the interests of one who stands accused.

A.

The Conflict Over the Duty of the Trial Judge.

As *Glasser* makes clear, the trial judge has the responsibility for protecting the accused's right to effective counsel in joint representation cases. 315 U.S. at 71. Yet the circuits are in sharp dispute over how a trial judge is to meet his responsibility.

The Eighth Circuit and the District of Columbia Circuit have ruled that the judge must make a careful inquiry into the possibility of prejudice and satisfy himself that no conflict of interests is likely. *United States* v. *Williams,* 429 F.2d 158, 161 (8th Cir. 1970); *Lollar* v. *United States,* 376 F.2d 243, 244-46 (D.C. Cir. 1967); *Campbell* v. *United States,* 352 F.2d 359 (D.C. Cir. 1965). In contrast, the Ninth Circuit and apparently the Sixth Circuit take the position that the judge need only be assured by counsel that there is no conflict of interests among his clients. *Kaplan* v. *United States,* 375 F.2d 895, 897 (9th Cir.), *cert. denied,* 389 U.S. 839 (1967); see *United States* v. *Cale,* 418 F.2d 897, 899 (6th Cir. 1969), *cert. denied,* 397 U.S. 1015 (1970). The Second Circuit holds that in assigned counsel cases, the judge must make a careful record inquiry, *Morgan* v. *United States,* 396 F.2d 110, 114 (2d Cir. 1968), but in retained counsel cases, the assurances of counsel will suffice, *United States* v. *Paz-Sierra,* 367 F.2d 931, 932-33 (2d Cir. 1966), *cert. denied,* 386 U.S. 935 (1967); *United States* v. *Armone,* 363 F.2d 385, 406 (2d Cir. 1966). The Tenth Circuit has expressly recognized the conflict in the circuits and has admonished the trial courts in its jurisdiction that "cautious practice" in indigent appointments would call for separate counsel. *Fryar* v. *United States,* 404 F.2d 1071, 1073 (10th Cir. 1968), *cert. denied,* 395 U.S. 964 (1969).

The disagreement among the circuits over the duties of trial judges in joint appointment cases is fundamental. Those circuits which demand careful inquiry are concerned with the ability of defendants who are unsophisticated in the law to evaluate potential conflicts, and the capacity of a lawyer, who believes that his clients' interests do not conflict, to appraise the risks of joint representation and

advise his clients accordingly. *E.g., Morgan* v. *United States, supra,* 396 F.2d at 114. Those circuits which simply rely on counsel are concerned that an inquiry by the judge will infringe on defendants' rights by delving into possible defenses and strategies. *United States* v. *Cale, supra,* 418 F.2d at 899. Moreover, they believe that trial judges have a right to rely on counsel as an officer of the court. *Kaplan* v. *United States, supra,* 375 F.2d at 897; *United States* v. *Armone, supra,* 363 F.2d at 406. Here, the Fourth Circuit followed the latter approach and was satisfied with a mere inquiry by the trial court as to whether the attorney thought there was a conflict and whether the defendants objected to joint representation.

Since indigents are powerless to obtain different counsel even when they object to joint representation, *United States* v. *Burkeen,* 355 F.2d 241 (6th Cir.), *cert. denied sub nom. Matlock* v. *United States,* 384 U.S. 957 (1966), they are clearly being treated differently from those who can afford their own lawyers. Moreover, those courts, like the ones below, which rely only on the lawyer to disclose potential conflicts of interest have created a situation unique in the criminal process. They permit the very person whose conduct determines whether a defendant has been afforded his constitutional right to effective counsel to be the sole arbiter of whether that right is protected.

Because of the constant presence of conflicts of interest among co-defendants, the American Bar Association says that multiple representation should never be undertaken without an informed consent by all of the defendants concerned. *ABA Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function* §3.5

(b) (1970). This Court should decide whether the Sixth Amendment permits less.[3]

B.

Inconsistent Holdings Where One Co-Defendant Implicates Another.

One of the essential reasons for this Court's holding in *Glasser* was the dilemma facing the defense lawyer as the prosecution developed its case. To represent Glasser properly, he would have had to emphasize the guilt of his other client.

An even stronger instance of subjecting counsel to defending conflicting interests would seem to occur where one defendant has made statements implicating others whom the lawyer is jointly representing. The lawyer cannot move for severance without benefitting one at the expense of the other. *See Baker* v. *Wainwright*, 422 F.2d 145, 149 (5th Cir. 1970). Moreover, if he defends both together, he either has to attack the defendant making the statement or accept singularly damaging evidence emphasizing the guilt of the others. *See Campbell* v. *United States, supra*, 352 F.2d at 360, 361. Strangely, however, the Courts of Appeals have produced an array of inconsistent decisions on this point.

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[3] The ABA recommendation provides as follows:

> 3.5 Conflict of Interest.
>
> • • • • •
>
> (b) . . . The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

The Third Circuit has held it an unconstitutional conflict of interest to represent co-defendants where one has implicated the others even when he repudiates the accusatory part of his statement on the witness stand. *Government of the Virgin Islands* v. *John*, 447 F.2d 69, 75 (3d Cir. 1971); see also, *Holland* v. *Henderson*, 11 Cr. L. Rep. 2211 (5th Cir. May 8, 1972). The Sixth Circuit, however, says that there is no conflict once the accusatory part of the statement is repudiated, *United States* v. *Cale, supra*, and is apparently willing to accept joint representation even where the lawyer represents persons indicted together and one becomes a witness for the government at the other's trial. *Beard* v. *United States*, 456 F.2d 1289 (6th Cir. 1972).

The Fifth Circuit has also held that if joint representation is to be permitted in the face of implicating statements, at the very least, the prosecution must forego introduction of the statements. *Baker* v. *Wainwright, supra*, 422 F.2d at 149; see also, *United States ex rel. Green* v. *Rundle*, 434 F.2d 1112, 1113 n. 1 (3d Cir. 1970), *rev'g on other grounds* 305 F. Supp. 523 (E.D. Pa. 1969). Otherwise counsel is put in the unseemly position of having to call the defendant making the statements as a witness to explain them and then cross-examine him for the benefit of the other defendants, or alternatively, not calling him, thereby denying the other defendants their right of confrontation. Three other circuits, however, disagree and hold that there is no conflict of interest so long as the evidence of guilt is strong or the defenses offered at trial appear consistent. *United States ex rel. Ross* v. *LaVallee*, 448 F.2d 552 (2d Cir. 1971). *McHenry* v. *United States*, 420 F.2d 927 (10th Cir. 1970). *Clark* v. *United States*, 412 F.2d 491 (9th Cir. 1969).

Here, the Fourth Circuit, which purportedly follows the rule that there cannot be joint representation when one defendant implicates the other, see *Sawyer* v. *Brough*, 358 F.2d 70 (4th Cir. 1966), held that the co-defendants' confession did not implicate the petitioner. Yet the co-defendants' statements were most damaging to Miller, see pp. 16-17, *infra*. Accordingly, the decision below reflects the immense difficulties in permitting joint representation whenever one defendant implicates the others.

C.

The Absence of a Uniform Standard.

Glasser enjoined courts from making "nice calculations as to the amount of prejudice" resulting from the denial of effective assistance of counsel in joint appointment cases. Nonetheless, on the issue of the degree of prejudice which must be shown to warrant relief, the Courts of Appeals again are in deep dispute.

Unquestionably, a joint appointment has to result in some prejudice for it to be invalid. *See Dukes* v. *Warden*, 40 U.S.L.W. 4492 (U.S. May 15, 1972). But the trial record will seldom reveal prejudice because a diligent lawyer will present the best common defense and submerge competing demands beyond view. *See Morgan* v. *United States*, *supra*, 396 F.2d at 114. Recognizing this problem, the District of Columbia Circuit has held that only where there is no basis for "an informed speculation" that a joint appointment had no prejudicial effect can a conviction stand. *Lollar* v. *United States*, *supra*, 376 F.2d at 247. The Third Circuit also refuses to put the burden on the defendant to show he was prejudiced from a conflict. *See Government*

of the Virgin Islands v. *John, supra,* 447 F.2d at 75 (3d Cir. 1971). On the other hand, the Ninth Circuit has expressly rejected the *Lollar* standard and requires instead a showing of specific prejudice on the record, *Carlson* v. *Nelson,* 443 F.2d 21 (9th Cir. 1971); see *Davidson* v. *Cupp,* 446 F.2d 642 (9th Cir. 1971); the Sixth Circuit has a similar rule. *United States* v. *Cale,* 418 F.2d 897 (6th Cir. 1969). This approach was followed below.

This Court should determine whether the latter rule, requiring a showing of specific prejudice on the record, can constitutionally be sustained. The effect of this rule is to deny relief, without even an evidentiary hearing, because of the failure of the record to demonstrate that the defense was affected. See, *e.g., Fryar* v. *United States, supra,* 404 F.2d at 1074; *United States* v. *Armone, supra,* 363 F.2d at 406. It seems particularly pernicious to require an indigent defendant to show, on the basis of that record, not only that his interests conflicted, but also that a separate defense would have been different and effective.

D.

The Appropriateness of This Case for Review.

This case raises, in a clear and uncomplicated fashion, these various issues which have caused such dispute among the circuits.

First, it dramatizes the inadequacy of the procedure, condemned in *Lollar, Morgan* and *Williams* and repudiated by the ABA, whereby a trial court simply defers to the judgment of counsel to determine whether there is any conflict. Here, the trial judge made no inquiry into the compatibility of the co-defendants' interests, but relied

completely and exclusively on a single statement by the appointed lawyer during the pretrial *voir dire.* See App., *infra,* p. 13a. The judge did not advise Miller or his co-defendants of their right to separate counsel if their interests conflicted. He failed to explain the dangers of joint representation, and he did not obtain their informed consent to it. On the contrary, the record shows he never gave direct consideration to how Miller's interests related to those of his co-defendants. There could be no better opportunity than this to examine whether the Sixth and Fourteenth Amendments permit such detachment to a judge who orders joint representation for indigent defendants.

Second, with regard to the legitimacy of allowing joint representation of co-defendants where the statements of one implicate the other, this case offers for inspection an instance of such joint representation more indulgent than any other ever tolerated by the Courts of Appeals. Not only was Miller accused of guilt by his co-defendant, but the statements implicating him were used against him at trial. Furthermore, the statements were never repudiated, and the man who made them refused to testify.

The contrast between this case and cases such as *John, Baker* and *Campbell* which prohibit joint representation is obvious. But even where joint representation was permitted despite the implication of one co-defendant by another, the statement was either repudiated on the witness stand, as in *Cale,* or the implicated party had given his own confession or made his own implicating statement, as in *McHenry* and *Clark.* There are no such ameliorating factors here. Few cases could more sharply raise the validity of allowing one attorney to represent simultaneously both a man accused and his accuser.

Finally, on the question of the proper standard for determining when an indigent defendant has a right to separate counsel, this case provides an excellent basis for examining the competing positions on the prejudice which must appear. The petitioner's court-appointed lawyer had at least nine opportunities to act in Miller's behalf at the expense of one or both of his co-defendants.

1. He could have excluded use of the implicating statement against Miller for all purposes by virtue of Miller's absolute right to severance under Virginia law. 4 Va. Code Ann. §19.1-202.

2. He could have avoided introduction of the implicating statement by objecting that Miller was being denied his Sixth Amendment right of confrontation. *Bruton* v. *United States,* 391 U.S. 123 (1968). *Douglas* v. *Alabama,* 380 U.S. 415 (1965).

3. He could have prevented the judge from relying on Miller's silence during police interrogation when his co-defendant accused him by objecting that the admission of such evidence violated Miller's Fifth Amendment right against self-incrimination, *Miranda* v. *Arizona,* 384 U.S. 436, 468 n. 37 (1966), and his right of silence under the Virginia rules of evidence, *Dykeman* v. *Commonwealth,* 201 Va. 807, 113 S.E.2d 867 (1960).

4. He could have called the co-defendant to the witness stand to vindicate Miller's Sixth Amendment rights of confrontation and cross-examination.

5. He could have used Miller's absolute right to severance to avoid associating Miller, who was not identified in any particular, from trial and identification

with his co-defendants who were identified by their dress and by their handling of the gun. *Buffalo Chief* v. *South Dakota,* 425 F.2d 271 (8th Cir. 1970), *rev'g on other grounds,* 297 F. Supp. 687 (D.S.D. 1969).

6. He could have focused his cross-examination of the victim to emphasize the clarity of the identification of the co-defendants in contrast to the identification of Miller. *Buffalo Chief* v. *South Dakota, supra.*

7. He could have made a closing argument contrasting Miller with his co-defendants, particularly with respect to Miller's consistent denials and the differences in the identifications.

8. He could have pressed for treatment of Miller as a juvenile by contrasting Miller with Lavone Robbs, four years Miller's senior, a convicted felon, the owner of a gun, and, if guilty, the instigator of the crime.

9. He could have made a scapegoat of Lavone Robbs at sentencing on the same ground.

From the trial record alone, it is exceedingly difficult to determine whether the court-appointed counsel's failure to do any of these things was a product of his joint representation. The point is, however, that to do any of them would throw Miller into direct conflict with his co-defendants. Exclusion of the statement would have forced Grover Robbs, who apparently had no valid objection to its admission, to stand alone. Attacks on the statement would make him a liar and render his subsequent denials even less worthy of belief. Contrasting the identifications would have focused guilt on Miller's co-defendants. Making

Lavone Robbs the scapegoat might well have increased his sentence. *Cf. Dukes* v. *Warden, supra.*

For the court below to have accepted all these conflicts and still have denied relief without an evidentiary hearing can only mean that the petitioner has not shown that separate counsel would have taken any of the steps outlined above or has not demonstrated that had they been taken the verdict and sentence would have been different. This holding adopts with a vengeance the rule that specific prejudice must be shown on the record.

If the promises of *Gideon* and *Argersinger* are to be honored when indigent defendants are jointly accused, decisions like the one below cannot stand.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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July 31, 1972

APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,278

HOWARD STATON MILLER,

Appellant,

—v.—

J. D. Cox, Superintendent of the Virginia State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
JOHN A. MACKENZIE, DISTRICT JUDGE.

(Argued February 9, 1972 Decided March 30, 1972.)

Before:

CRAVEN and RUSSELL, *Circuit Judges* and CHAPMAN, *District Judge.*

HARVEY E. BINES (Court-appointed counsel) *for Appellant,* and WILLIAM P. ROBINSON, JR., Assistant Attorney General of Virginia (Andrew P. Miller, Attorney General of Virginia, on brief), *for Appellee.*

CRAVEN, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division, denying a state prisoner habeas corpus relief under 28 U.S.C.A. §2241(c)(3). We affirm.

Appellant Miller was arrested and charged with the armed robbery of a Richmond gas station and the abduction of its attendant, Earl Johnson. The robbery was perpetrated by three black men about 1:30 A.M. Soon thereafter police stopped the getaway vehicle but the occupants fled leaving Johnson unharmed. The search continued. Between 3:30 A.M. and 4:00 A.M. officers located three black men walking together in downtown Richmond. When the three saw the police car, they broke and ran. The officers pursued them and apprehended Miller and one Levone Robbs. They were searched, and several rolls of coins like those taken in the robbery were found in their pockets and a revolver in Lavone Robbs' jacket. They were then taken to police headquarters. At the police station they were put in a room with Grover Robbs, Lavone's brother, who had been arrested also as a suspect in the same robbery and abduction. All three were advised that they had a right to remain silent and that anything they said could be used against them in court. A police detective then took Grover Robbs aside and talked with him. Within the presence and hearing of Miller and Lavone Robbs, Grover Robbs "admitted that he was with these two men when they pulled the robbery and abducted Mr. Johnson in his car, and he pointed to both men that they were with him." (App. 57). Miller and Lavone Robbs "made no statement at that particular time, but before and after that they denied any part in the robbery." (App. 61).

The detective asked Grover Robbs "who had the gun," but "he refused to name the person who actually had the gun." (App. 58).

All three were tried in the Hustings Court of the City of Richmond, Part II, before a judge sitting without a jury. Earl Johnson, the victim of the crimes, positively identified Miller and his codefendants at the trial. His testimony was persuasive because of unusual opportunity both before and after the crime to observe them. Grover Robbs' confession and Miller's silence in response to it were admitted into evidence. Grover Robbs did not testify. The three were convicted of armed robbery, abduction, and unauthorized use of an automobile. Miller appealed his conviction to the Virginia Supreme Court of Appeals and has unsuccessfully exhausted state remedies.

After careful consideration of the record, briefs, and arguments in this case, we conclude that with one exception the alleged grounds for relief are without merit and warrant little comment. Miller was not incompetently represented in violation of his Sixth Amendment right to adequate counsel. The transcript simply does not show that his attorney's services were "so transparently inadequate as to make a farce of the trial." *Root* v. *Cunningham*, 344 F.2d 1, 3 (4th Cir. 1965). Nor was Miller denied effective assistance of counsel because he and his codefendants were represented by a single attorney at their joint trial. Miller does not show that his interests were significantly in conflict with the interests of Lavone and Grover Robbs. His case is distinguishable from *Sawyer* v. *Brough*, 348 F.2d 70 (4th Cir. 1966), in which the court held that one attorney could not represent codefendants at a joint trial where one had confessed implicating the other. In *Sawyer*, the confessing defendant attempted to exculpate himself by shift-

ing most of the blame to his codefendant. This created the conflict of interests in *Sawyer*: the defendant implicated by the confession would have wanted it excluded or attacked, but the defendant partially absolved by the confession would have wanted it admitted and defended. No such conflict of interests existed in the present case. All the defendants in the present case plead "not guilty." The confession of Grover Robbs contained nothing exculpatory of him or even mitigating the offense. He did not even attempt to shift blame to Lavone Robbs or Miller by asserting that either had the gun. All three defendants had an identical interest with respect to the confession—it would have been in the interest of all to have the confession excluded or attacked.

Miller's claim that Grover Robbs' confession implicating him was inadmissible is not without merit.

The trial judge did not rely on the content of Grover Robbs' confession but rather on Miller's silence in response to the accusatory material within it. In summing up the evidence upon which he based his decision, the judge said,

> Now, you have another thing, two of the men have denied it, before and since, when they were pointed out by their third codefendant. At that time they said nothing, when he accused them of being with him. (App. 78).

The rule regarding tacit or adoptive admissions followed by the Virginia courts has been expressed thus by the Virginia Supreme Court of Appeals in *Dykeman* v. *Commonwealth*, 201 Va. 807, 811-12, 113 S.E.2d 867, 871 (1960):

> The general rule is that when a statement accusing one of the commission of an offense is made in his

> presence and hearing and is not denied, both the statement and the fact of his failure to deny are admissible in a criminal proceeding against him as evidence of his acquiescence in its truth. It is based on the theory that the natural reaction of one accused of crime is to deny the accusation if it is unjust or untrue. The accusation and his silence thereunder to be admissible must, however, have been under such circumstances as would naturally call for a reply or denial and such as would afford a favorable opportunity for denial. The character of the incriminating statement made to the accused would render it inadmissible as hearsay except for the fact that the statement is not offered in evidence as proof of a fact asserted but as a predicate to the showing of the reaction of the accused thereto. In all instances caution must be exercised in receiving evidence of a statement made to the accused and his failure to deny it. The test is whether men similarly situated would have felt themselves called upon to deny the statements affecting them in the event they did not intend to express acquiescence by the failure to do so.

Mindful of the caveat of the Virginia Supreme Court of Appeals that "caution must be exercised" in admitting evidence under this rule, we conclude that Grovers' confession as a context for Miller's silence was inadmissible under Virginia law because it was not made "under such circumstances as would naturally call for a reply or denial." Miller had been told only shortly before that he had a right to remain silent. It is likely that this instruction effectively deadened his natural inclination to speak out in his own defense. Furthermore, because Miller denied his guilt both

before and after Grover's confession, we think that he would not have felt himself "called upon to deny the statements affecting [him]," and that his silence cannot logically be construed as an admission of guilt. *See Knight* v. *Commonwealth,* 196 Va. 433, 83 S.E.2d 738, 740-41 (1954); *Plymale* v. *Commonwealth,* 195 Va. 582, 79 S.E.2d 610, 615-16 (1954).

But Miller's reliance on *Bruton* v. *United States,* 391 U.S. 123 (1968), is misplaced.[1] In that case the Supreme Court held that the introduction of a codefendant's confession that implicated the defendant violated the defendant's Sixth Amendment right to confront witnesses against him because the codefendant refused to testify. The trial judge here relied on the confession not for the truth of its content but as a context for Miller's silence. Miller would have gained nothing from cross-examining Grover Robbs about the confession because the truthfulness of the confession was irrelevant to the purpose for which it was admitted.

Finally, Miller claims that he was deprived of his Fifth Amendment right to remain silent by the trial judge's reliance on his silence in response to Grover Robbs' confession. He bases his claim upon the following language from *Miranda* v *.Arizona,* 384 U.S. 436, 468 n. 37 (1966):

> In accordance with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

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[1] *Bruton* involved a trial by jury. We need not decide whether the rule of *Bruton* applies to a trial before a judge, because we hold *Bruton* inapplicable on other grounds.

At the time of his silence, however, Miller was not under police interrogation. The attention of the police detective was focused upon Grover Robbs and not upon Miller. Miller's silence was a reaction to the voluntary accusation by Grover Robbs and not to a question or accusation by the police detective directed to him. The Fifth Amendment bars confessions compelled by the government and not by circumstance. Miller's claim, therefore, is without merit. But see *United States ex rel. Smith* v. *Brierly,* 384 F.2d 992 (3rd Cir. 1967); *United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967); *Ivey* v. *United States,* 344 F.2d 770 (5th Cir. 1965).

Although it was error under the Virginia law of evidence to receive Robbs' confession as explanatory of Miller's silence when accused, we think it was not error of constitutional magnitude, and we deem it harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967). That Miller fled when no man pursued, that he possessed similar rolls of coins so soon after the robbery, and that he was so persuasively identified by the victim constitutes "overwhelming" evidence of guilt without regard to his silence under accusation. *Harrington* v. *California,* 395 U.S. 250 (1969).

AFFIRMED.

Order Denying Rehearing *en Banc*

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,278

HOWARD STATON MILLER,

Appellant,

—v.—

J. D. COX,
Superintendent of the Virginia State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

JOHN A. MCKENZIE, *District Judge.*

ORDER

A majority of the court having voted against rehearing en banc, the petition is denied.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

FILED
May 1, 1972
SAMUEL W. PHILLIPS
Clerk

A True Copy, Teste:
SAMUEL W. PHILLIPS, *Clerk*
By DIANE BURKE
Deputy Clerk

Decision of the United States District Court for the Eastern District of Virginia

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Misc. No. 280-70-N

HOWARD STATON MILLER,

Petitioner,

—v.—

J. D. COX,
Superintendent of the Virginia State Penitentiary,

Respondent.

MEMORANDUM ORDER

A petition for a writ of habeas corpus filed by the petitioner, a state court prisoner, has been heretofore filed by Order of this Court dated April 28, 1970.

In due course, the answer of the respondent was received on May 11, 1970, together with the records of the original trial in the Hustings Court of the City of Richmond, Part II, on July 31, 1968, and a state habeas corpus petition in the same court heard in March 1969. Petitioner's original conviction was upheld by Order of the Supreme Court of Appeals of Virginia rendered December 6, 1968. Petitioner's application for a writ of habeas corpus was denied by

Judge William E. Spain on July 20, 1969. He appealed from the adverse ruling on his state habeas corpus, but a writ of error was denied by the Supreme Court of Appeals of Virginia. The petitioner has exhausted his state court remedies.

I

Petitioner first alleges that he was arrested illegally without a warrant and without probable cause for his arrest.

The testimony is that at 2:30 A.M., April 7, 1968, Richmond police had gone to a service station on information that a robbery would be attempted there. When they arrived, they found the station open, a lock broken off of one of the cabinets, five cartons of cigarettes were lying on a bench, and the attendant was missing. Based on the scene and the other information that Detective Windsor then had, he put out an all-car broadcast to be on the lookout for an old model blue car thought to be occupied by the service station attendant, Earl Johnson, and three colored males.

A few moments after the all-car broadcast, Detective O'Brien fell in behind an old blue Buick generally fitting the automobile description.

While following the automobile, it ran a "stop" sign, started swerving, finally stopped and three colored males jumped out and ran. The fourth occupant was Earl Johnson, the service station attendant, who had been abducted by the three robbery participants. This information was added to the broadcast about the robbery. At 4:00 A.M. a Richmond policeman observed three Negro males on the street and when he approached them, they ran. Subsequently, he stopped the three and other officers came to the

scene. On the basis of the description in the earlier all-car broadcast, the three Negro males were placed under arrest. Upon Miller's arrest, he was found to have three rolls of pennies, one roll of nickels, 56 cents in change, and $28.00 in United States Currency.

In view of this evidence in the trial record, this Court has no difficulty in finding that this arrest for a felony was with probable cause, no formal warrant was necessary and was fully justified.

II

The petitioner's second allegation is that he was interrogated by police without counsel.

A review of the trial records indicate that this petitioner denied at the time of his arrest and at all times thereafter, that he had anything to do with the robbery. All three charges, robbery, abduction and unauthorized use of an automobile, were fully proved by independent evidence and by competent witnesses. No statement from Miller was used in connection with his conviction. The allegation that he was interrogated without counsel present is therefore of no moment in this matter.

III

The petitioner next alleges that his attorney was not a criminal attorney and was, therefore, incapable of handling his defense.

The record discloses that Mr. A. Clair Seager was appointed by the Court as counsel for the petitioner. Mr. Seager represented the petitioner in Juvenile Court before his certification to be tried as an adult. The record reflects that he had many conversations with his petitioner and with

the other two defendants, whom he also represented; that he was careful to see that all statutory procedures in the Juvenile Court were properly complied with, including the rendering of a psychological report. All three of the defendants, including this petitioner, said on at least four occasions that they were entirely satisfied with his representation of them. Also, the trial record indicates his cross-examination of all witnesses and reflects considerable ability. Unfortunately for the defendant, the evidence was overwhelming and his attorney's efforts on his behalf were to no avail. In addition, this allegation is vague, general and is unsupported by facts sufficient for consideration. *Marslin* v. *Schmucker*, 89 F.2d 765 (4th Cir. 1937).

IV

Petitioner's fourth allegation is that the oral statement of a co-defendant, Grover Robbs, Jr., to a detective, that he was along at the time and that the other two, one of whom was the petitioner, Howard Miller, were the other participants, was admitted against the petitioner at the joint trial and amounted to a conflict of interest on the part of the petitioner's attorney. It appears that the statement that Howard Miller was a participant in the crime, as made by Grover Robbs, had been made in the presence of Howard Miller who was there and heard it. In spite of this accusatory remark, Miller denied any part of the proceedings then and later.

The record is replete with every safeguard taken by Judge Spain to protect the rights of this petitioner. He was specifically asked if he agreed to a joint trial, which he did. He was specifically asked if he was satisfied with his lawyer before the trial started, and he was. He was

asked if he had any complaint about anyone connected with the Commonwealth and he said, "No." The question of representation of the three defendants was discussed with the Court in the presence of the three defendants and Mr Seager, the attorney, said that he saw no conflict of interest and the three defendants made no statement to the contrary. This petitioner was advised of his right to testify and he declined to do so. At the conclusion of his trial, he stated affirmatively that he had no complaint about his attorney. At his sentencing, two months later, he again stated that he had no complaint about his attorney. This Court finds that the record is clear that every effort was made by the trial court to safeguard this petitioner's rights and to determine that if, at any time, he was dissatisfied. It was apparent that he was not, that this allegation is an afterthought which has no merit to it.

On the other hand, Miller was identified by the filling station attendant, Earl Johnson, as one of the participants; Johnson stated that a short pistol was used; a snub-nosed .38 revolver loaded with ammunition was found in Miller's pocket when he was arrested by Detective Wright. This, together with the rolls of coins also on Miller's person, the same or similar to those taken from the service station, were adequate even without the statement of the co-defendant, Grover Robbs.

V and VI

The petitioner's fifth and sixth allegations are that his rights were not protected at his juvenile hearing.

The trial record indicates that he was represented by counsel at the juvenile hearing. He had been arraigned originally in the police court, but, upon proof that he was

only 17 years of age, that proceeding had been immediately adjourned, and the matter brought to the attention of the proper juvenile court. His general allegation is not sufficient to offset the unequivocal trial record that all rights were indeed protected.

VII

The petitioner's seventh allegation is that he was not identified by anyone except his co-defendant.

The record adequately rebuts this in that this petitioner was positively identified by the victim of the abduction and robbery, Earl Johnson.

VIII

The petitioner's last allegation is that he was not provided with counsel in his petition for habeas corpus in the state court.

The record was bountifully reviewed by Judge Spain, who heard the case, and who dismissed it on the petition, answer and record without finding it necessary to hold a plenary hearing. This Court fully agrees with the handling of the matter by Judge Spain and his finding that the appointment of counsel and a plenary hearing was not necessary in this case.

There is no merit in any of the petitioner's allegations and it is

ORDERED that the petition be, and it hereby is, DENIED and DISMISSED.

The petitioner is advised that he may appeal in forma pauperis from this *final order* by forwarding a *written* notice of appeal to the Clerk of the United States District

Court, Room 307, Post Office Building, Norfolk, Virginia, 23510, which said *written* notice of appeal must be received by the Clerk within thirty (30) days from the date of this final order and may be filed without the prepayment of costs or giving security therefor. This Court declines to issue a certificate of probable cause.

The Clerk shall mail a certified copy of this Memorandum Order to the Attorney General of Virginia, the Clerk of the Hustings Court of the City of Richmond, Part II, and to the petitioner.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
October 7, 1970

Filed
Oct 7 1970
W. Farley Powers, Jr., Clerk

By P. L. Powers, Deputy Clerk

Excerpts From the Trial Testimony

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

COMMONWEALTH OF VIRGINIA

VS.

HOWARD MILLER, GROVER ROBBS, JR., and LAVONE ROBBS

Complete TRANSCRIPT of all the testimony and other incidents in the above, when heard on May 28, 1968, before Honorable William E. Spain, Judge.

APPEARANCES:

Charles E. Maurice, Esquire, Assistant Commonwealth's Attorney, City of Richmond, Virginia;
A. Clair Sager, Esquire, 911 Hull Street, Richmond, Virginia, Counsel for all three defendants;
The three defendants in person.

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[6]

The Court: I see. All right.

Now, I ask all three of you men, and I want you to answer one at a time, do you have any objection to being tried with each other?

Do you have any objection, let's start this way, Howard Miller?

Defendant Miller: No.

The Court: Do you, Grover Robbs, Jr.?

Defendant Grover Robbs, Jr.: No, sir.

The Court: Do you, Lavone Robbs?

Defendant Lavone Robbs: No.

The Court: Now, it is apparent that I have three charges against you, felony charges. Do you have any objection to those three charges being tried all together?

I ask you first, Howard Miller.

Defendant Miller: No.

The Court: Grover Robbs, Jr.?

[7]

Defendant Grover Robbs, Jr.: No, sir.

The Court: Lavone Robbs?

Defendant Lavone Robbs: No.

The Court: Now, have you discussed this matter, or the matters which I have taken up with you, thoroughly with your lawyer?

Defendant Miller: Yes.

Defendant Grover Robbs, Jr.: Yes.

Defendant Lavone Robbs: Yes.

The Court: Have you discussed with your lawyer the question of any witnesses you might have?

(Pause.)

The Court: Do you have any witnesses?

Defendant Grover Robbs, Jr.: No.

Defendant Lavone Robbs: No.

Defendant Miller: No.

The Court: Are you all ready for trial?

Defendant Miller: Yes, sir.

Defendant Lavone Robbs: Yes, sir.

Defendant Grover Robbs, Jr.: Yes, sir.

The Court: Are you satisfied with the work your lawyer has done for you?

Defendant Miller: Yes, sir.

Defendant Grover Robbs, Jr.: Yes, sir.

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Defendant Lavone Robbs: Yes, sir.

The Court: Do you have any complaint about the conduct of anyone connected with the Commonwealth in this case?

Defendant Grover Robbs, Jr.: No, sir.

Defendant Miller: No, sir.

Defendant Lavone Robbs: No, sir.

The Court: Do you understand all the questions you have been asked and all the answers you have given?

Defendant Grover Robbs, Jr.: Yes, sir.

Defendant Miller: Yes, sir.

Defendant Lavone Robbs: Yes, sir.

The Court: Have you talked with Mr. Sager about whether you wish to be tried by the Judge or a jury?

Defendant Grover Robbs, Jr.: Yes, sir.

Defendant Miller: Yes, sir.

Defendant Lavone Robbs: Yes, sir.

The Court: What is your choice, and I ask you this one at a time. Howard Miller, what is your choice?

Defendant Miller: The Judge.

The Court: Grover Robbs, Jr.?

Defendant Grover Robbs, Jr.: The Judge.

[9]

The Court: And Lavone Robbs?

Defendant Lavone Robbs: The Judge.

Mr. Maurice: The Commonwealth concurs.

The Court: Well, the Court concurs.

Madam Clerk, before I go any further, I wish these men to be arraigned and I wish them arraigned one at a time on each of the three charges.

The Clerk: Yes, sir.

The Clerk: Howard Miller, you remain standing, and the others be seated.

The Court: Well, one other question. Mr. Sager, is there any possibility in your mind or foreseeable that there may be any conflict between your representation of these three men?

Mr. Sager: No, Your Honor, I have gone into that rather thoroughly and I have had repeated interviews with these men.

I wish to state for the record that on first blush it might have been my modus operandi in these cases to make the Commonwealth's Attorney elect which one of these indictments he wished to proceed under, and have separate trials for each one on each indictment, and we would fill up all the available dates for the next month or so, but I have left that matter entirely to

[10]

these men. I have explained the pros and cons of a jury trial thoroughly with them, and their expression here is of their own predilection and their own avenue. I have given them time to think it over, Your Honor.

The Court: All right.

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[18]

The Court: Now, all three of you stand up again.

Note: All three defendants are now standing.

The Court: Do you fully understand that you are the defendants in the indictments that have just been read to you?

Defendant Lavone Robbs: Yes.

Defendant Grover Robbs, Jr.: Yes.

Defendant Miller: Yes.

The Court: Mr. Sager, I wish to ask you some questions.

Have you explained to these men in your conferences with them the seriousness of the charges of which they are indicted?

Mr. Sager: I have endeavored so to do.

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The Court: Well, I mean what the possible punishment could be.

Mr. Sager: Yes, Your Honor.

The Court: I again ask all three of you men, are you satisfied with the work that Mr. Sager has done for you up until now?

Defendant Lavone Robbs: Yes.

Defendant Grover Robbs, Jr.: Yes.

Defendant Miller: Yes.

The Court: I believe that is all. You may be seated.

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[58]

Mr. Maurice: That is the Commonwealth's case.

The Court: Very well.

Mr. Sager: One moment, please.

Note: At this point Mr. Sager is conferring with his client, whereupon he states, viz:

Mr. Sager: Defense rests.

The Court: You three men, stand up, please.

Note: The three defendants are now standing.

[59]

The Court: I want to inform you now that each of you has the right to take the witness stand and testify,

if you so desire. You are not compelled to do so, and the Court under the law cannot draw any inference adverse to your interests. That is, the Court cannot hold it against you if you don't testify, but whether you testify or not is your own decision.

Now, I ask each in turn, do you wish to testify, Howard Miller?

Defendant Miller: No.

The Court: Grover Robbs, Jr.?

Defendant Grover Robbs, Jr.: No.

The Court: And Lavone Robbs?

Defendant Lavone Robbs: No.

The Court: All right. Do you have any complaint to make about the way your lawyer has handled your case up until now?

Defendant Lavone Robbs: No.

Defendant Miller: No.

Defendant Grover Robbs, Jr.: No.

The Court: Very well, be seated.

* * * * *

[66]

June 31, 1968

Note: The case is called at 10:35 A.M., viz:

The Court: Mr. Sager, these three men, Lavone Robbs, Grover Robbs, Jr., and Howard Miller were tried together and a presentence report was ordered. It now has been received and was made by Mr. Ernest Bartha, Chief Probation and Parole Officer, who is present here in court and may be examined or cross examined as you choose.

Mr. Sager: I have no interrogation or question of Mr. Bartha.

The Court: Very well.

Lavone Robbs, stand up. Do you have any complaint to make about the way your lawyer has handled your case?

Defendant Lavone Robbs: No.

The Court: All right. You may be seated.

Grover Robbs, Jr., do you have any complaint to make about the way Mr. Sager has handled your case?

Defendant Grover Robbs, Jr.: No.

The Court: Howard Miller—

Defendant Miller: No.

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The Court: Stand up. Do you have any complaint to make about the way your lawyer has handled your case?

Defendant Miller: No.

The Court: All right.